

Unilateral Trade Measures in Times of Geopolitical Rivalry

Thomas Verellen

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The European Union's unilateral trade policy is in motion. On 5 May 2021, the European Commission adopted a [proposal](#) for a regulation to tackle foreign subsidies; in March 2021, the Commission launched a [public consultation](#) on an 'anti-coercion' instrument. Likewise, existing instruments such as the [EU's anti-dumping rules](#) have been 'modernised' and new instruments including a [foreign direct investment \(FDI\) screening framework](#) have been introduced to update and expand the EU's unilateral trade policy toolbox. As the EU develops this toolbox fit for a geopolitical age, the governance of that toolbox is in need of scrutiny. Existing accountability mechanisms are no longer fit for purpose as EU trade policy becomes increasingly embedded in geopolitical rivalries, and greater democratic oversight is needed to ensure that the European Commission is held to account as it wields its newfound powers. This blog post critically assesses the central role of the Commission in the governance of unilateral trade policy instruments and puts forward a number of possible reforms. It concludes with a call for further research: how to rethink accountability in an era of [geoeconomics](#) in which trade policy and (geo)politics have become intertwined?

Who Decides?

There is quite a bit of variety between the different unilateral trade policy instruments when it comes to the details of their governance arrangements. In some instances, the Commission can act by means of implementing acts (e.g. [here](#)); in other by means of delegated acts (e.g. [here](#)). In yet other instances, the Commission can act alone without any meaningful checks. This is the case, for example, when it issues opinions on proposed FDI projects, or when it decides to start WTO dispute settlement proceedings.

Despite the above variety, most unilateral trade policy instruments have a few features in common: a central role for the Commission, a relatively small role for the Council, and nearly no role for the European Parliament. When it comes to implementing measures, typically Member States can oppose a measure by qualified majority vote – a bar that is difficult to reach. Absent a negative opinion by qualified majority vote, the Commission can ultimately adopt the measure.

From one perspective, it makes sense for the Commission to be able to act independently, unhindered by checks that hamper prompt decision-making. Unilateral trade policy instruments usually relate to the EU's common commercial policy, which is an area of exclusive EU competence that traditionally has been driven by the Commission. Such instruments could be considered of an 'executive' as opposed to a 'legislative' nature, which warrants the use of implementing and

delegated acts to make decisions. Furthermore, the powers of the Commission have been granted to it by the European Parliament and the Council, as co-legislators enacting the applicable framework regulations. As such, whatever the Commission decides is ultimately backed by Council and Parliament.

From another perspective, independent Commission action makes less sense. When it comes to the negotiation of international agreements – including trade agreements – the decision-making process set out in Article 218 TFEU mirrors that of the internal ordinary legislative procedure in which both the Council and the Parliament have a role to play. Similarly, to define EU positions in international bodies, the Council has the power to act (Article 218(9) TFEU). Why involve the Council and European Parliament when engaging in bilateral, plurilateral or multilateral trade policy, but exclude them in whole or in part when enacting unilateral measures?

Further, the Council alone enacts restrictive measures, and it does so by unanimity. This arrangement – as is the case for the entire [ring-fencing](#) of the EU's common foreign and security policy as an area of intergovernmental decision-making – has traditionally been justified by the political and thus sensitive nature of restrictive measures. Conversely, traditional trade policy measures have been deemed technical, and thus to be managed by the supranational Commission. In an era of geoeconomics, this dichotomy has become untenable. Trade policy has become embedded in geopolitical rivalries and is today – arguably more obviously so than in years past – intertwined with foreign policy. As a consequence, the case for independent Commission action without meaningful checks by Parliament or Council has become harder to make.

Finally, there are indications that the Commission itself does not want to take politically sensitive decisions without being backed by either Parliament or Council. A number of implementing acts on the issue of genetically modified organisms are a case in point: when the Commission was faced with a 'no opinion' scenario in the Comitology appeal committee, it was forced to act alone. In response, the Commission [proposed](#) to make it easier for Member States to adopt an opinion in the appeal committee. At the time of writing, this proposal is still being [discussed](#) in Parliament and Council.

Moving forward: more accountability needed

Geopoliticization makes trade policy more political. This, in turn, calls for effective accountability mechanisms. What form could such mechanisms take?

Implementing acts as currently conceived in the [Comitology regulation](#) may very well *not* be the appropriate instruments for the EU to engage in '[war by other means](#)'. The stakes may be too high for politically sensitive decisions to be taken by the Commission alone, without meaningful possibilities for Member States and the European Parliament to play a role.

At the same time, subjecting individual decisions to the ordinary legislative procedure would make it too difficult for the EU to act promptly. Similarly, a move towards

Council decision-making by unanimity – as is currently the case for restrictive measures – should be avoided. As [recent experience](#) shows, foreign policy decision-making by unanimity transfers decision-making power to third countries, which can block EU measures through the leverage they have acquired over individual Member States.

Further, Council action by means of qualified majority vote, without any involvement of the European Parliament – an arrangement that currently exists for restrictive measures adopted on the basis of Article 215 TFEU following an earlier CFSP decision adopted by unanimity – is not an appropriate option either. In an area of exclusive competence such as the common commercial policy, indirect democratic legitimacy through the Council is insufficient; it must be supplemented with direct democratic legitimacy through the European Parliament.

A greater use of delegated acts is one way to strengthen democratic oversight while allowing for relatively quick decision-making. From the vantage point of democratic legitimacy, a delegated act is to be preferred over an implementing act since the former can be opposed by either Council or European Parliament, whereas the latter can be opposed only by the Member States meeting within the competent Comitology committee.

The Court of Justice has [confirmed](#) that the EU legislature (i.e. the Council and Parliament) has discretion when it decides to confer a delegated or an implementing power to the Commission, and judicial review of that choice is limited to manifest errors of assessment. When designing new unilateral trade policy instruments such as the abovementioned anti-coercion instrument, the EU legislature should make use of this flexibility and empower the Commission to act by delegated as opposed to implementing acts.

Another option to beef up democratic accountability is to involve the European Parliament in a reformed Comitology process. In the pre-Lisbon era, the Parliament played a role in the so-called '[regulatory procedure with scrutiny](#)'. Today, the Parliament's role in the Comitology process is marginal at best: it is to be kept informed, and it can protest if it considers a draft implementing act to be *ultra vires*, in which case the Commission has to review the draft.

Both Commission and Council can be expected to favour implementing acts over delegated acts when designing unilateral trade policy instruments since implementing acts can be adopted without Parliamentary involvement, whereas delegated acts can be blocked by Council or Parliament. To ensure sufficient democratic oversight regardless of whether the EU legislature empowers the Commission to act by delegated or implementing act, a more pronounced role for the European Parliament in the Comitology process should be considered. This could be achieved by amending the Comitology regulation.

Conclusion

Further analysis, including comparative research to identify best practices, is needed to design new and creative ways in which the Commission can be held accountable when it wields its newfound powers in an increasingly volatile geopolitical environment. Certain is that a new balance between democratic accountability and efficient decision-making is needed as the EU enters a new era of economic statecraft.

